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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-1816

CHARLES O. PERRY, Senior, and
CARDELLE L. PERRY,
Petitioners,

v.

DISTRICT OF COLUMBIA,
a Municipal Corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

CHARLES O. PERRY, Senior, and
CARDELLE L. PERRY,
Petitioners,
5880 Eastern Avenue, N.E.,
Washington, D.C. 20011

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TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
FIFTH AMENDMENT, UNITED STATES CONSTITUTION	3
STATUTES INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	4
CONCLUSION	8
APPENDIX:	
Order of the Tax Court, April 25, 1973	1a
Judgment of the D.C. Court of Appeals, January 31, 1974	2a

AUTHORITIES CITED

Cases:

District of Columbia v. Berenter, (1972) 151 U.S. App. D.C. 196, 466 F.2d 367	5
Scheuer, et al. v. Rhodes, et al., (Case No. 72-914, decided April 17, 1974) by this Court), ___ U.S. ___, ___ L.Ed.2d ___, ___ S.Ct. ___	6

Page

Wallace v. D.C. Unemployment Compensation Board, (D.C. Ct. App., 1972), 289 A.2d 885, at page 887 7

Statutes:

28 U.S.C. 1257, Public Law 91-358, Title I, Section 172(a)(1), 84 Stat. 590 2

D.C. Code, Section 47-2403, 1973 Edition (84 Stat. 579) 2

District of Columbia Revenue Act of 1939 53 Stat. 1085, at 1119 (Chapter 367) 2, 4, 7

Reorganization of the District of Columbia Courts, Public Law 91-358, 84 Stat. 579, Section 161(a)(3) . . . 3, 7

District of Columbia Administrative Procedure Act, Public Law 90-614, 82 Stat. 1203, 1204, 1206, 1207, 1208, 1209, 1210 . . . . . 3, 4, 5, 7

Miscellaneous:

Title 16, D.C. Register, Special Edition, D.C. Rules and Regulations, Department of Finance And Franchise Taxes 2

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DISTRICT OF COLUMBIA,
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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

Petitioners, Charles O. Perry, Senior, and Cardelle L. Perry, pray that a writ of certiorari issue to review the Judgment of the District of Columbia Court of Appeals entered January 31, 1974.

OPINIONS BELOW

The Judgment or decision of the District of Columbia Court of Appeals is unofficially reported at 314 Atlantic 2d 766 (1974), and is printed in the Appendix.

The Superior Court of the District of Columbia, Tax Division, promulgated its order, April 25, 1973, and is printed in the Appendix.

JURISDICTION

The Judgment of the District of Columbia Court of Appeals was entered January 31, 1974; and, an Order denying Petition For Rehearing *En Banc* was entered March 4, 1974.

Jurisdiction of this Court is invoked pursuant to Title 28, USC, Section 1257, as amended to July 29, 1970, Public Law 91 – 358, Title I, Section 172(a) (1) 84 Stat. 590.

QUESTIONS PRESENTED

Whether or not the prepayment of taxes is a condition precedent to invoke the jurisdiction of the Tax Division of the Superior Court of the District of Columbia, where the promulgation and publication of "*Income Tax Appeal Procedures*"[1] is part of the statutory[2] scheme of Section 47-2403, D.C. Code 1973, Edition?

or

Whether or not the tax-payer is precluded from seeking relief in the Tax Court of the District of Columbia, where

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[1] See page 31, Record, District of Columbia Court of Appeals. Pages 112 through 170a are devoid of any "appeal procedures", DC Register, Special Edition, DC Rules and Regulations, Title 16, Department of Finance and Franchise Taxes.

See also – Petitioner's Brief, DC Court of Appeals' Record, pages 32 through 33, filed herein.

[2] 53 Stat. 1119, Title VIII – General Provisions: Rules and Regulations "Sec. 2. The Commissioners shall prescribe and publish all needful rules and regulations for the enforcement of this Act." See, Footnote 4, infra.

the District of Columbia admittedly[3] failed to promulgate and publish procedural regulations – "*Income Tax Appeal Procedures*", as required by the District of Columbia Administrative Procedure Act?

FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION

> "No person shall . . . be deprived of life liberty, or property, without due process of law; . . ."

STATUTES INVOLVED

Amendments Relating To The Revenue Laws of the District of Columbia.

84 Stat. 579, Public Law 91-358, July 29, 1970.

Section 161 . . .

> "(3) Section 3 of title IX of such Act (D.C. Code, sec. 47-2403) is amended to read as follows:
>
> "SEC. 3. Any person aggrieved by any assessment by the District of any personal-property, inheritance, estate, business-privilege, gross-

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[3] See Respondent's Brief, at page 6, filed in the Court below:

> "Two questions are raised by appellants . . . The first question concerns whether or not the Department of Finance and Revenue was required by Public Law 90-614 (the *Administrative Procedure Act of the District of Columbia*, 82 Stat. 1206, 1207, 1208, 1209, 1210) to enact and publish rules and regulations of procedures before the Assessor in determining income tax deficiencies. The District is of the view that the answer is in the negative."

receipts, gross-earnings, insurance premiums, or motor-vehicle-fuel tax or taxes, or penalties thereon, may within six months after payment of the tax, together with penalties and interest assessed thereon, appeal from the assessment to the Superior of the District of Columbia. The mailing to the taxpayer of a statement of taxes dues shall be considered notice of assessment with respect to the taxes. The court shall hear and determine all questions arising on appeal and shall make separate findings of fact and conclusions of law, and shall render its decision in writing. The court may affirm, cancel, reduce, or increase the assessment."

Title VIII – General Provisions, 53 Stat. 1119, Rules and Regulations.

"Sec. 2. The Commissioners shall prescribe and publish all needful rules and regulations for the enforcement of this Act."

STATEMENT OF THE CASE

On or about February 21, 1973, petitioners, husband and wife, filed a Petition For Redetermination Of Tax Liability in the Tax Division of the Superior Court of the District of Columbia. Petitioners alleged, among other things, that –

This action arises under the provisions of the District of Columbia Code, Title 47, Sections 1501 et seq., Income and Franchise Tax Act of 1947, as amended; and the District of Columbia Administrative Procedure Act, 82 Stat. 1203, Public Law 90-614.

The determination of the tax set forth in the notice of deficiency is based on the following errors and in derogation of petitioners constitutional rights as defined by the Fifth Amendment of the Federal Constitution, due process provision; and the statutory provisions[4] of the Administrative Procedure Act of the District of Columbia, in the following respects –

(a) The Director of Finance failed to make "Findings of Fact" and "Conclusions of Law" as required by the Administrative Act;

(b) The Finance Department failed to print and promulgate procedural regulations as required by the District of Columbia Procedure Act;

(c) The Finance Department's determination of tax liability is arbitrary, capricious, and without support of the principles of law and equity; and

(d) The Department of Finance has no procedural rules at all and that the rules, if any, contain little or no exposition of ones rights, few procedural details, inadequate references to availability and type of hearings, no hint as to appellate review, vague or incomplete statements as to applicable standards and no reference to statutory citations.

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[4] 82 Stat. 1204, Section 2: "This Act shall supplement all other provisions of law establishing procedures to be observed by the Commissioner, the Council, and agencies of the District government in the application of laws administered by them, except that this chapter shall supersede any such law and procedure to the extent of any conflict therewith."

See also, Footnote 2, supra.

That the foregoing audit was malicious, intentional, and in derogation of the Constitutional[5] rights, statutory[6] rights of petitioners, and the employees of the District of Columbia acted in excess of their statutory authority, by virtue of which petitioners should be awarded punitive damages against the individuals in the sum or amount of $10,000.00.

The respondent filed a motion to dismiss the petition on the ground that the Tax Division of the Superior Court of the District of Columbia lacked jurisdiction (plea in abatement, or dilatory pleas) of the subject matter, for the reason that petitioners had failed to prepay the assessment. The appellate court affirmed the dismissal, and asserted further that "We note further that this interpretation is consistent with the holding by the United States Court of Appeals for the District of Columbia Circuit in *District of Columbia v. Berenter*, 151 US App DC 196, 466 F 2d 367 (1972), a real estate tax under D.C. Code 1967, Section 47-709, incorporating the jurisdictional prerequisite of Section 47-2403 . . ." The conclusion is erroneous for the reason that the taxpayers had made an election of remedies. No election of remedy was available to the petitioners herein. It is obvious to any individual who is knowledgable of the principles of American Jurisprudence pertaining to Taxation, Personal, and Real Property, that the principles are not the same, or identical.

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[5] See, Fifth Amendment, United States Constitution.

[6] 42 USC 1983. Compare: Scheuer v. Rhodes (72-914, Decided April 17, 1974, by this Court), ___ US ___, ___ L Ed 2d ___, ___ S Ct ___.

REASONS FOR GRANTING THE WRIT

On July 26, 1939, the 76th Congress, First Session, enacted Chapter 367 – "*District of Columbia Revenue Act of 1939*", 53 Stat. 1085. Thirty-one years later Congress amended[7] section 3 of Title IX of such Act (D.C. Code, section 47-2403), the present provision in dispute; but Congress did not modify or amend Section 2, Title VIII, 53 Stat. 1119 of the same Act. Section 2 of the "*District of Columbia Revenue Act of 1939*", provides that the Department of Finance And Revenue of the District of Columbia "shall prescribe and publish all needful rules and regulations" for the enforcement of the District of Columbia Revenue Act, provided the rules and regulations promulgated by the Agency are not repugnant to, or inconsistent with the provisions of the District of Columbia Administrative Procedure Act. Compare: *Wallace v. D.C. Unemployment Compensation Board* (DC Ct App, 1972), 289 A 2d 885, at page 887.

Petitioners concede that the instant proceedings are without the purview of the definition of a "contested case", but nonetheless, the Department of Finance And Revenue of the District of Columbia is required[8] to "*prescribe and publish*" – "*Income Tax Appeal Procedures*", pursuant to Section 2 of the DC Administrative Procedure Act, 84 Stat. 1204; and 53 Stat. 1119, Section 2.

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[7] Public Law 91-358, July 29, 1970, 84 Stat. 579.

[8] See, Footnotes 1, 2, 3, and 4, supra. See also, Statutes Involved, supra.

CONCLUSION

For the foregoing reasons, the Writ should be granted forthwith, and the judgment below summarily reversed.

Respectfully submitted,

CHARLES O. PERRY, SR., and
CARDELLE L. PERRY,

Petitioners.

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
TAX DIVISION

CHARLES O. PERRY, SR. and CARDELLA L. PERRY,	)	MAR 23 1973
Petitioners,	)	Superior Court of the District of Columbia Tax Division
v.	)	Docket No. 2198
DISTRICT OF COLUMBIA,	)	
Respondent.	)	

MOTION TO DISMISS PETITION

Respondent, District of Columbia, moves this Honorable Court, pursuant to Rule 9 of the Rules of the Tax Division, Superior Court of the District of Columbia, for the reasons as set forth in the attached Memorandum of Points and Authorities, to dismiss the petition filed in the above-entitled proceeding.

Respectfully submitted.

C. Francis Murphy
C. FRANCIS MURPHY
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Henry E. Nixon
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GRANTED APRIL 25, 1973

Norma Holloway Johnson
JUDGE

4/26/73 Copy mailed to Mr. Charles Perry & Mr. Melvin Washington. Odell A. Libutti, Clerk

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 7593

CHARLES O. PERRY, SR., and CARDELLE L. PERRY,
APPELLANTS,

v.

DISTRICT OF COLUMBIA, A Municipal Corporation
APPELLEE.

Appeal from the Superior Court of the
District of Columbia

(Argued December 14, 1973 Decided January 31, 1974)

Charles O. Perry, Sr., and *Cardelle L. Perry* were on the brief for appellants, pro se.

Melvin J. Washington, Assistant Corporation Counsel, with whom *C. Francis Murphy*, Corporation Counsel, and *Henry E. Wixon*, Assistant Corporation Counsel, were on the brief, for appellee.

Before Fickling, Gallagher, and Nebeker, Associate Judges.

NEBEKER, *Associate Judge:* This appeal results from the trial court's dismissal of appellants' "Petition for Redetermination of Tax Liability". Specifically, the court dismissed the petition after having found that it

lacked jurisdiction because appellants had not prepaid the adjusted tax liability prior to pursuing their judicial remedy. We affirm the dismissal.

Appellants filed joint tax returns for the years 1969, 1970, and 1971. After auditing those returns, the Department of Finance and Revenue (the Department) requested a hearing with appellants for a substantiation of certain reported itemized deductions. Receiving no response to the request, the Department notified appellants of the audit changes which resulted in the greater tax liability. Appellants, protesting the changes, sought a hearing with the Department. After the hearing the Department notified appellants by mail of the final determination of the tax liability, including accrued interest. Appellants filed with the Tax Division of the trial court a petition for redetermination of the tax liability, the dismissal of which is the subject of this appeal.

In the petition, appellants alleged certain procedural violations including the Department's failure to promulgate an "*income tax appeal procedure*". The government's "Motion to Dismiss the Petition" was based, *inter alia*, upon the fact that the court was without jurisdiction because of appellants' failure to prepay the additional assessed tax. D.C. Code 1973, § 47-2403 provides, in part:

> Any person aggrieved by any assessment by the District of any personal-property, inheritance, estate, business-privilege, gross-receipts, gross-earnings, insurance premiums, or motor-vehicle-fuel tax or taxes, or penalties thereon, may within six months after payment of the tax together with penalties and interest assessed thereon, appeal from the assessment to the Superior Court . . . .

The trial court's dismissal of the petition must be affirmed in light of the language of § 47-2403 to the effect that judicial review of a tax assessment does not lie until the disputed tax, together with interest and penalties, has been paid. We note further that this interpretation is consistent with the holding by the United States Court of Appeals for the District of Columbia Circuit in *District of Columbia v. Berenter*, 151 U.S.App.D.C. 196, 466 F.2d 367 (1972), a real estate tax case under D.C. Code 1967, § 47-709, incorporating the jurisdictional prerequisite of § 47-2403, *supra*. *See also Flora v. United States*, 357 U.S. 63 (1958). We, therefore, hold that appellants' failure to prepay the disputed tax difference precludes them from seeking relief in the Tax Division. The order of dismissal is

Affirmed.